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No. 88-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI,
NEWPORT GALLERIA GROUP,
ROBERT J. CONGEL
and the PYRAMID COMPANIES,
Petitioners,

vs.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The American Planning Association respectfully moves for leave to file the attached brief as *Amicus Curiae* in support of the Petitioners. Consent to file the brief has been obtained from the attorney for the Petitioners Bersani, *et al.*, Petitioners Robichaud, *et al.*, and Respondent United States Environmental Protection Agency. The consent of the attorney for Intervenors-Respondents Sierra Club, *et al.* was requested but refused.

As more fully explained in the attached brief, the American Planning Association agrees with EPA's objective of protecting wetlands. The American Planning Association has adopted a policy urging that high priority be given to public acquisition of wetlands for protection, preservation, and restoration. The concern, therefore, is not with EPA's goal, but with the means it has chosen to achieve that goal.

The interests of the American Planning Association lie in seeing that clear, fair, uniform, rational rules exist for the development of areas which impact wetlands. The decision below would make rational wetlands planning impossible.

Because of the more than 14,000 permit applications processed each year by the Corps of Engineers (with EPA veto power) under §404 of the Federal Water Pollution Control Act, the existance of the opinion below as the definitive authority on the application of that law threatens chaos in rational planning by governmental bodies as well as private developers. For that reason, the American Planning Association believes that this Court's review is needed, and submits the attached brief in support of the Petitioners.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF AMICUS CURIAE	1
REVIEW OF THE DECISION BELOW IS IMPORTANT TO AVOID CHAOS IN THE ADMINISTRATION OF THE FEDERAL WETLANDS REGULATION PROGRAM	4
IT MAKES NO SENSE FROM A PLANNING PERSPECTIVE TO DETERMINE WHETHER A PERMIT SHOULD ISSUE BY EVALUATING ALTERNATIVE PROJECT SITES WHICH WERE THEORETICALLY AVAILABLE AT THE FIRST MOMENT THE PROPONENT THOUGHT ABOUT DEVELOPING A PROJECT	5
A The "Standard" Is Not a Standard	7
B The "Standard" Makes No Sense	8
C Adverse Impact of the "Standard" on Planning for the Construction of Necessary Public Facilities	12

Page

IMPLEMENTATION OF THE "STANDARD" WILL SUBJECT GOVERNMENT AGENCIES TO THE RISK OF INVERSE CONDEMNATION JUDGMENTS FOR LONG-RANGE PLANNING ACTIVITIES 14

CONCLUSION 18

APPENDIX

News Article from the STAR-LEDGER, Thursday, November 24, 1988, "EPA acts to block proposed 3,300 housing units in Secaucus meadows" by Michael Rozansky A-1

TABLE OF AUTHORITIES

Page

Cases

American Federation of Musicians v. Wittstein (1964)
379 US 171 4

Association of American Railroads v. Costle
(DC Cir 1977) 562 F 2d 1310 11

Espinoza v. Farah Mfg. Co. (1973)
414 US 86 11

First English Evangelical Lutheran Church v.
County of Los Angeles (1987)
483 US ___, 96 L Ed 2d 250 15

Jones v. People ex rel. Dept. of Transportation (1978)
22 Cal 3d 144, 583 P 2d 165 16

Kirby Forest Indus., Inc. v. United States (1984)
467 US 1 15

Messiah Baptist Church v. County of Jefferson
(D Col 1987) 697 F Supp 396 8

National Broiler Marketing Assn. v.
United States (1978)
436 US 816 4

NRDC v. EPA
(DC Cir 1973) 475 F 2d 968 11

Port Terminal R.R. Assn. v. United States
(5th Cir 1977) 551 F 2d 1336 7

	Page
Rothensies v. Electric S.B. Co. (1946) 329 US 296	4
United States v. Ruzicka (1946) 329 US 287	4
Statutes	
Federal Water Pollution Control Act §404 33 USC §1344	5, 8-10, 13, 16
Regulations	
40 CFR §230.10	5
Texts	
Kmiec, *Zoning and Planning Deskbook* (1986) §4.05(2)	7
Mandelker, *Land Use Law* (2d ed 1988) §6.02	7
Report	
Conservation Foundation, *Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum* (1988)	14

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BRIEF OF THE AMERICAN PLANNING ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

By leave of Court, the American Planning Association files this brief as *Amicus Curiae* in support of the Petitioners.

INTEREST OF AMICUS CURIAE

The American Planning Association is a nonprofit, public interest, and research organization, whose 21,000 members are dominantly professional planners, elected and appointed government officials, and citizens involved in urban and rural planning.

The primary objective of the American Planning Association is to advance the use of planning to improve the development of the nation, its communities, and to conserve the nation's resources. In furtherance of those objectives, the American Planning Association and its 45 chapters (divided roughly along state lines) and 15 substantive divisions (environment, transportation, economic development, *etc.*) sponsor research of interest to the planning community and sponsor award programs to acknowledge outstanding planning programs, projects, and individuals.

When issues involving the interrelationship of law and planning are before this Court, the American Planning Association seeks to provide assistance through the filing of *Amicus Curiae* briefs.

As professionals in land use planning, the members of the American Planning Association are concerned about the potential impact of the decision below if it is allowed to stand.

Bluntly, from a land use planning perspective, the decision makes no sense. It approves a "standard" for examining the impact of proposed development affecting wetlands which cannot be recognized as a standard. The opinion expressly approves — indeed, seems to find laudatory — the fuzziness of the "standard" which it endorses:

> ". . . it is unnecessary to pin down the standard to such a degree and . . . it would confuse things further to attempt to do so." (850 F 2d at 46)

With respect, that is not wise planning. It hardly qualifies as "planning" of any sort. It leaves so much to

discretion that no one can know — until EPA rules, after the fact — what the rules *were* when the acts were done.[1]

Moreover, by making the determinative time in the development process the point at which some developer gave some thought to pursuing a project, the opinion can upset the ability of public agencies to plan for the future, and subject public agencies to inverse condemnation claims.

The potential impact of the decision is vast. As the opinion of the Court of Appeals acknowledges, the Corps of Engineers processes more than 11,000 wetland permit applications *each year*, and the rule established below could be applicable in *each* of those thousands of proceedings.[2]

The American Planning Association agrees with EPA's objective of protecting wetlands. The American Planning Association has adopted a policy urging that high priority be given to public acquisition of wetlands for protection, preservation, and restoration. The concern, therefore, is not with EPA's goal, but with the means it has chosen to achieve that goal.

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[1] As this brief is being written, EPA is threatening to veto a 3,301 home development (including low-and moderate-income housing) in Secaucus, New Jersey. (See news article attached as an appendix.)

Apparently emboldened by the Court of Appeals' approval of the standardless "standard" applied in the case at bench, EPA's Acting Regional Administrator has announced that he will veto the project because, although the developer showed that the homes could not be built elsewhere in a 471 square mile, three county, area, it had not been shown that the project could not proceed in some more distant locale. How distant? He wouldn't say. With respect, that is not planning by any definition.

[2] The total is actually closer to 14,000 per year. (See Pet for Cert, p 4, fn 1.)

The interests of the American Planning Association lie in seeing that clear, fair, uniform, rational rules exist for the development of areas which impact wetlands. The decision below makes rational wetlands planning impossible.

REVIEW OF THE DECISION BELOW IS IMPORTANT TO AVOID CHAOS IN THE ADMINISTRATION OF THE FEDERAL WETLANDS REGULATION PROGRAM

There is no need for this Court to await further developments in lower courts before addressing the issue in this case. The competing viewpoints are starkly presented here in the majority opinion by Judge Timbers and the dissenting opinion by Judge Pratt. One of those views (the dissent) makes sense; the other makes a shambles of rational planning.

Thus, while this may be, as the majority below says, a case of first impression (850 F 2d at 45), the time to deal with it is now, before significant mischief is done in the thousands of wetlands permit proceedings the Corps conducts each year.

In reviewing federal statutes of widespread application, this Court has acknowledged the propriety of deciding important issues early, even when they are first impression issues addressed by only one Court of Appeals. (*American Federation of Musicians v. Wittstein* [1964] 379 US 171, 175 [question was "an important one of first impression under the" federal statute]; *U.S. v. Ruzicka* [1946] 329 US 287, 288 ["raises questions of importance in the administration of the" federal statute]; *Rothensies v. Electric S.B. Co.* [1946] 329 US 296, 299 [certiorari granted because of the "gravity of this holding to the administration of the tax laws"]; *National Broiler*

Marketing Assn. v. U.S. [1978] 436 US 816, 820 [certiorari granted because "of the importance of the issue for the agricultural community and for the administration of the antitrust laws"])

The issue presented here is as important to land use planners, government regulatory agencies, property owners and developers, and the proper administration of a federal program which involves 14,000 permit applications *each year*, as it was to those involved in each of the cited cases.

Review now is important to avoid chaos in the administration of the program.

IT MAKES NO SENSE FROM A PLANNING PERSPECTIVE TO DETERMINE WHETHER A PERMIT SHOULD ISSUE BY EVALUATING ALTERNATIVE PROJECT SITES WHICH WERE THEORETICALLY AVAILABLE AT THE FIRST MOMENT THE PROPONENT THOUGHT ABOUT DEVELOPING A PROJECT

The legislative history and plain meaning of section 404 of the Federal Water Pollution Control Act (33 USC §1344) are ably discussed in the Petition, and need not be repeated.

What concerns the American Planning Association is EPA's interpretation of the guidelines for application of that statute, which appear at 40 CFR §230.10. The guidelines explain when a permit for development which impinges on wetlands ought to be denied because of the existence of alternative sites for the project which will not so impinge:

> "(a) Except as provided under section 404(b)(2) [pertaining to navigation] no discharge of dredged or fill material shall be permitted if there *is* a *practicable alternative* to the proposed discharge which would have less adverse impacts on the acquatic ecosystem . . .
>
> "(2) An alternative *is practicable* if it *is available* and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it *is* otherwise a practicable alternative, an area *not presently owned* by the applicant *which could reasonably be obtained*, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered." (Emphasis added.)

EPA had taken a guideline which is plainly written in the *present* tense and interpreted it in the *past* tense. It has decided to determine whether an alternative *is* available by determining what *was* available at some hazy point in the past. The Court of Appeals' majority not only approved this transformation, it permitted it to be done in such a vague way (by evaluating conditions at the time of "market entry" — whatever that may mean) that it created a "standard" which is not capable of fair or rational application.

A

The "Standard" Is Not a Standard

Planning and zoning officials are familiar with the need for standards. Indeed, as a matter of settled land use law, delegation of power to an administrative agency is invalid unless accompanied by sufficient standards to guide both the agency and the project applicant:

> "To properly delegate, the legislature must specify standards to guide an administrator's zoning decision. The standards should clearly state how the administrator is to apply zoning laws in a manner which protects individual property rights from abitrary decision-making." (Kmiec, *Zoning and Planning Deskbook* [1986] §4.05[2], p 4-26; *see also* Mandelker, *Land Use Law* [2d ed 1988] §6.02, p 205.)

Federal agencies are likewise familiar with the need for standards, so that applicants will know how to conform their conduct. (*E.g., Port Terminal R.R. Assn. v. U.S.* [5th Cir 1977] 551 F 2d 1336, 1344-1345.)

Such standards need to be objective, so that they may be fairly and uniformly applied by any administrator to any applicant.

Here, the Court of Appeals majority creates no standard. EPA simply decided that it would view the availability of alternative sites as of the date the project applicant "entered the market" for property for the project. However, EPA refused to specify what "market entry" means, or even that it would mean the same thing in all cases. And the Court of Appeals held that to be a sufficient "standard" for local government agencies and private citizens to understand.

But it is not. The announced "standard" is as amorphous as it is subjective.

As shown in the Petition, each time the EPA issued a decision or filed a brief, and even at different points in the same document, it changed the way the "standard" was viewed. (Pet for Cert, pp 13-14) EPA insisted on a Will-o-the-wisp "standard," which it could enforce at its whim, and the Court of Appeals' majority approved.

Moreover, as Judge Pratt's dissent ably highlights, the "standard" is subjective to an extreme: it is focused entirely on the *identity* of the permit applicant and when that particular applicant first started looking for a site, rather than on the protection of the wetland. (850 F 2d at 48-49)

An amorphous, subjective "standard" is no standard at all. (*See Messiah Baptist Church v. County of Jefferson* [D Col 1987] 697 F Supp 396, 399.)

B

The "Standard" Makes No Sense

The market entry "standard" is incapable of rational application in any manner which permits either government agencies or private developers to know what to expect from EPA when plans are evaluated for §404 compliance, years after they have been made.

First, WHEN is the line drawn? The Court of Appeals refused to require EPA to specify *when* "market entry" occurs. It could occur when some company official (or government employee, if the project is a public one) first muses about the project. It could occur when that person begins looking for possible sites. It could occur when general plans are begun, or discussed, or finally approved. It could occur when applications

for permits are made, or considered, or ruled on. It could occur when offers to purchase are made, or when a purchase is consummated. If the project requires multiple purchases (as is often the case with public projects), it could occur at any point in the land acquisition assembly process. It could even occur when someone else thought of the project.[3]

The alternative sites available at "market entry" may have become unavailable years before permit application. In such cases, needed public projects may be vetoed by EPA — and thus never be constructed — despite the public need for them, and despite the fact that *no* alternative sites exist when the project is sought to be transformed from a desired plan to a concrete facility.

Rational planning cannot occur in such circumstances. The problem is that the consequence of *when* the action is evaluated is critical to a determination under §404. It is the availability of alternatives on that date which determines whether a project will be permitted or not.

Second, HOW is the line drawn? The central question in a §404 review is the availability of alternative sites. Under the "standard" approved by the Court of Appeals, alternative sites will *always* (in a theoretical sense) be "available." That Court said:

> "In its final determination [EPA] stated several reasons why it believed the North Attleboro site should be deemed to have been 'available.' It stated, among other things, (1) that *NED could 'have been talked into relinquishing its interest' in the*

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[3] Please recall that the majority below suggested that "market entry" could have occurred in this case when the company from whom the present developer bought the property first thought about the project. (850 F 2d at 47)

site even in September or December 1983 . . ." (850 F 2d at 47; emphasis added.)

Disregarding, for the moment, that NED was a *competitor* of the applicant in this case, whose presumed receptivity to "relinquishing its interest" seems problematical at best, the theory behind that statement means that *all* sites (presumably developed or undeveloped) which could be transformed to suit the proposed project need to be considered as "available" alternatives because their present owners might be "talked into relinquishing [their] interest."

Such an interpretation makes a sham of the statute. It removes any pretense of a "standard" by which ordinary mortals can measure their conduct, by compelling them to pursue the purchase of any number of alternatives, whether they are currently in use or not. While the suggestion seems absurd on its face, it is the logical meaning of the quoted passage from the majority opinion below.

Third, WHERE is the line drawn? As shown in the attached news article, EPA has apparently become emboldened by the approval of its amorphous reading of the requirements of §404, and is now casting its net in a broad *geographic* manner to determine the existence of "available" alternative sites. If a project proponent can be told that ascertaining that there are no available sites in a three county, 471 square mile, area is not sufficient to satisfy the statute, then there is no way to satisfy the statute.

It would appear that EPA is embarked on a program not envisioned by Congress. Congress, as the Petition aptly shows, drafted a statute with clear standards. Apparently, EPA would prefer it if the statute were worded differently. However, as EPA has been told in the past, it must enforce what Congress passes, regardless of EPA's view that something else may have been

more practical or achieved a better result. If EPA wants something other than what Congress passed, it must seek an amendment to the statute. EPA may not alter the statute by regulatory interpretation. (*E.g., NRDC v. EPA* [DC Cir 1973) 475 F 2d 968, 970; *Association of American Railroads v. Costle* [DC Cir 1977] 562 F 2d 1310, 1318-1320.) The *Railroads* case is outspoken:

> "The EPA argues that its interpretation of the Noise Control Act should be accorded deference by a reviewing court because it is the agency charged with administering the Act. While it is an established principle of administrative law that reviewing courts will generally 'show "great deference to the interpretation given [a] statute by the officers or agency charged with its administration," ' *this principle has no application where, as here, the agency has misinterpreted its statutory mandate.* In such cases of misinterpretation, it is our duty to correct the legal error of the agency as we have done here." (562 F 2d at 1318-1319; emphasis added.)[4]
>
> "The EPA argues quite strenuously that 'practical factors' compel the conclusion that Congress did not intend all railroad equipment and facilities to be regulated. EPA contends that '[i]t is inconceivable that Congress intended EPA to investigate

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[4] As this Court bluntly stated in *Espinoza v. Farah Mfg. Co.* (1973) 414 US 86, 94-95:

> "Courts need not defer to an administrative construction of a statute where there are compelling indications that it is wrong."

> and control every inconsequential piece of railroad equipment . . .'
>
> * * *
>
> "This is perhaps an understandable effort to introduce an element of flexibility into the promulgation of noise emission standards. It is not, however, for us as a reviewing court to add this dimension of flexibility to the statutory framework. Congress has dictated that the EPA regulate 'the equipment and facilities' of interstate rail carriers. Congress has *not* provided the agency with the type of discretion it evidently desires and contends for in this case. We are bound to effectuate the legislative will and we perceive it to be unambiguous in this context. If the EPA desires an element of flexibility in its operations, the agency must look to Congress and not to the courts." (562 F 2d at 1319-1320; emphasis, the Court's.)

The "standard" concocted by EPA and approved by a 2-1 vote of the Court of Appeals is unworkable. This Court's review is needed to restore order to this statutory review procedure.

C

Adverse Impact of the "Standard" on Planning for the Construction of Necessary Public Facilities

As a planning tool, which must be used by government agencies as well as private developers, the market entry "standard" is useless. To be effective, planning —

whether corporate or governmental — needs to focus on long range goals. Anything less is not planning, but short-run "damage control."

The "standard" upheld below will seriously impair long range planning for needed public facilities. Indeed, it may make it impossible to plan in areas with wetlands.

In applying its "standard," EPA relied on hypothetical evidence supplied by the "trade custom" of developers to investigate potential sites for several months before purchase. (850 F 2d at 47)[5] If that is an appropriate "standard" for judging project applicants, it would cripple governmental projects. For it is equally well known that the "trade custom" in governmental circles is to take a longer look at potential projects than the few months hypothesized below.

Partly because of statutory requirements, partly because of the scope of governmental projects, and partly because of the political need to obtain significant public input before embarking on major projects, government agencies sometimes consume years in the planning of facilities. When was their "market entry" for §404 purposes? Under the rationale below, major public works projects could be disapproved by EPA after years of planning, analyses, reports, and hearings before various state and local bodies because EPA concluded that, when the process began many years earlier, a less intrusive alternative existed.

The problem with public projects today is that they require *too much* time from initial thought to pouring concrete. This causes difficulties for the agencies planning those projects, the property owners in the path of the projects, and the general citizenry which will

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[5] Although the District Court rejected this ground, the Court of Appeals' majority says it may be entitled to some weight, at least when joined with other considerations. (850 F 2d at 47)

eventually benefit from the public projects. The decision below could lengthen that process still further and, potentially, preclude construction of some projects altogether — regardless of their evident need — because of EPA's after-the-fact conclusion that a once-available alternative was not considered.

EPA's need to protect wetlands is not here questioned. However, the protection of wetlands can be accomplished in a manner which does not grind long range planning to a halt. Local planners are not the villains in the piece. In fact, they may be better able than EPA to understand the *actual* availability of local alternatives.[6]

IMPLEMENTATION OF THE "STANDARD" WILL SUBJECT GOVERNMENT AGENCIES TO THE RISK OF INVERSE CONDEMNATION JUDGMENTS FOR LONG-RANGE PLANNING ACTIVITIES

This Court's decisions have generally insulated government's general planning function from actions by property owners who claim that governmental plans have taken their property without compensation, in violation of the Fifth and Fourteenth Amendments. So long as only planning has taken place, and the rights of private property owners are not infringed, no governmental liability arises. Even the filing of an action to condemn

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[6] Interestingly, a recent report of the National Wetlands Policy Forum, convened by the Conservation Foundation at the request of EPA, concluded that wetlands conservation would be better managed at the local level. (Conservation Foundation, *Protecting America's Wetlands: An Action Agenda, The Final Report of the National Wetlands Policy Forum* [1988])

property, accompanied by the filing of a *lis pendens* has been held not to be sufficiently acquisitory of an interest in private property to require compensation before the acquisition is consummated. (*Kirby Forest Indus., Inc. v. U.S.* [1984] 467 US 1, 13-15.)

The decision below undermines the *Kirby* precept, and may render government liable for compensation for regulatory takings (see *First English Evangelical Lutheran Church v. County of Los Angeles* [1987] 483 US ___, 96 L Ed 2d 250) for doing no more than planning for future development.

For example, it is not unusual for state and local government to prepare plans for future highways many years before they have any intention to construct them. (Indeed, they may never be constructed at all.) Given the considerations which must go into such planning (*e.g.*, evolving transportation needs, environmental impact evaluations, population growth patterns), both the planning process and implementation of the plan can take many years. The following statement by the California Supreme Court (denying compensation for the effects of long-range highway planning) is typical:

> "We can acquiesce in the following proposition: if the only acts of which plaintiffs complain were the adoption of the route, the designation of their land for future acquisition, and the purchase of some of the properties along the right of way, *there would be no such direct and special interference* with plaintiffs' rights as to justify an action in inverse condemnation. As was pointed out in *Smith v. State of California* . . . planning and construction of a freeway requires a substantial period of time, and a holding that announcement of the plan for the freeway

> results in inverse condemnation of properties designated for ultimate acquisition would result in the forced purchase by the state of large amounts of property which might never be used and would severely hamper the government's ability to make needed improvements in the highway system. The need for flexibility in planning, changing the design of, or even abandoning a proposal for a highway militates against the theory that an action for inverse condemnation lies for the general effects of such conduct." (*Jones v. People ex rel. Dept. of Transportation* [1978] 22 Cal 3d 144, 152, 583 P 2d 165; emphasis added.)

The decision below casts serious doubt on the validity of that reasoning, particularly if the public project is along any part of the thousands of miles of shoreline within the Corps' wetlands jurisdiction.[7]

Under the decision below, the critical moment is the *first* time the government planners *thought about* establishing the highway route or other public facility, *not* the time the property was actually acquired for the project. If *that* becomes the focal point for §404 evaluation, it would seem difficult for a court to hold simultaneously that that same early date is *not* also the appropriate time to evaluate the impact of the proposed project on private property owners who would be adversely affected by the project upon fruition. For, if all alternatives must be considered at the first inkling that a project may go forward, and the positions of the parties are frozen at

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[7] Although the concern in this case is with wetland areas, the analysis applies equally to other public projects in non-wetland areas nationwide.

that time, then the impact on private property owners in the path of a contemplated public project will be direct and substantial at the time of "market entry." The traditional view that a general plan is a vision of what *should* happen in the future will have to be discarded, as the specific sites noted on the plan will be concretely targeted for acquisition, severely impairing the rights of the owners of those parcels to use them in any economically viable manner.

Thus, aside from the failure of the "market entry" standard to make sense as a planning tool, it could end up either subjecting government to numerous suits for compensation when plans are initially formulated, or so inhibiting government from planning that long-range plans will simply not be drawn.

Neither result is in the public interest.

CONCLUSION

A 2-1 majority of the Court of Appeals has approved an *ad hoc* EPA "standard" which no one can rationally articulate, let alone conform to. That "standard," if applied in the 14,000 annual permit reviews conducted by the Corps of Engineers (with EPA hovering in the wings with its standardless veto power), will make a shambles of public planning.

The American Planning Association joins with the Petitioners in urging this Court to grant Certiorari to review the decision below so that proper planning for the use and protection of wetlands may proceed in an orderly fashion.

Respectfully submitted,

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MICHAEL M. BERGER

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APPENDIX

THE STAR-LEDGER, Thursday, November 24, 1988

EPA acts to block proposed 3,300 housing units in Secaucus meadows

By MICHAEL ROZANSKY

The Environmental Protection Agency (EPA) is battling a plan to build 3,301 housing units in meadowlands in Secaucus, seriously threatening the largest housing development proposed for the region.

The EPA's acting regional administrator, William J. Muszynski, said this week in a letter to three congressmen that Hartz Mountain Industries Inc. has failed to prove "that the proposed housing cannot be built elsewhere."

In addition, he wrote, Hartz's plan to compensate for destroying 97 acres of wetlands by upgrading the quality of 116 other acres of wetlands "is not sound environmental planning," in part because it did not create new wetlands.

The project, known as the Villages at Mill Creek, is awaiting approval by the Army Corps of Engineers, which is expected to decide next month whether to issue a dredge-and-fill permit. The EPA advises the Corps, but also can overrule the Corps — and has done so — on permit decisions.

The housing, a crucial part of the housing plan developed by the Hackensack Meadowlands Development Commission (HMDC) in the 20,000-acre district, would rise along the Mill Creek north of Route 3 and west of the eastern spur of the New Jersey Turnpike.

Muszynski said in an interview that he was convinced that Hartz failed to consider "obvious alternative sites" on dry land, such as Newark. "That's one that quickly comes to mind," he said.

"There are alternatives, and if the Corps moves forward and approves the permit, I will exercise my option" and seek to overrule it, he said.

His opposition was revealed in a reply to Reps. Robert G. Torricelli (D-9th Dist.), Robert A. Roe (D-8th Dist.) and Frank J. Guarini (D-14th Dist.). The three wrote EPA Administrator Lee M. Thomas in September seeking his support for the development, which they said would provide "urgently needed homes," including low- and moderate-income housing.

"From a social and economic standpoint," they wrote, "the impacts of this project are clearly beneficial."

The congressmen said Hartz proved that the project could not be developed elsewhere in the 471-square-mile region of Hudson, Bergen and Passaic counties. But Muszynski asked why Hartz limited its analysis to that area.

Asked how far Hartz should have looked, he said, "Obviously I don't expect them to look in Nevada, but it's got to be a case-by-case basis" in which developers show that their analysis is reasonable.

The HMDC has said alternatives should be within the Meadowlands district, which is its area of jurisdiction.

Alan Marcus, a Hartz spokesman, said the project is in accord with the HMDC's 1972 master plan, and addresses the region's housing and environmental needs.

"Ultimately the houses at Mill Creek will be built because it is needed, it makes sense, and it's the right thing to do," he said. "Even when public agencies oppose something, when something's the right thing to do, it gets done."

Hartz has spent millions of dollars to create a 63-acre salt marsh as compensation for taking wetlands for its Harmon Meadow office-shopping development in Secaucus.